No. 548 16

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ALFRED E. BUTLER,

Appellant,

—against—

STATE OF MICHIGAN,

Appellee.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ALFRED E. BUTLER,
Appellant,

—against—

STATE OF MICHIGAN,
Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Recorder's Court of the City of Detroit, State of Michigan, entered on the 13th day of July, 1954, convicting him of violating Section 28.575, Michigan Statutes Annotated (Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953). Appellant's application for leave to appeal to the Supreme Court of the State of Michigan was denied on July 14, 1955. Appellant now submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the trial judge of the Recorder's Court was unreported and was delivered orally at the conclusion of the proceedings. A copy of the stenographic transcript of this opinion is attached hereto as Appendix A.

Jurisdiction

Appellant was convicted of violating a Michigan statute making it a crime to sell, offer or possess for sale a book *containing* obscene, immoral, lewd or lascivious language or descriptions tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. He was sentenced to pay a fine of $100.00. In a motion to dismiss made at the outset of the trial and repeated throughout the litigation, the appellant contended that the Michigan statute, upon which the prosecution was based, was an infringement of the appellant's rights guaranteed him by the First and Fourteenth Amendments of the Constitution of the United States in that it deprived him of his freedom of press and of due process of law.

These motions were all denied by the trial judge, and thereafter the appellant filed a timely application to the Supreme Court of the State of Michigan for leave to appeal, contending that the said Michigan statute, on its face and as applied, and the judgment of the Recorder's Court predicated thereon, violated the appellant's rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Although appellant's application for such leave to appeal was consented to by the People of the State of Michigan on the ground that "the issues involved in this case are of great public interest", and further, that a "clarification of the language of" the statute was "necessary", the Michigan Supreme Court entered an order on July 14, 1955, denying the appellant's application for leave to appeal. Notice of appeal to the Supreme Court of the United States was filed in the Recorder's Court of the City of Detroit on September 2, 1955.

The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Title 28, U. S. Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Winters* v. *New York* (1947), 333 U. S. 507; *Burstyn* v. *Wilson* (1952) 343 U. S. 495.

Questions Presented

The following questions are presented by this appeal. Does the said Michigan statute, on its face and as applied, which provides that:

> "Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor."

violate the appellant's rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States in that:

(a) its provisions blanketly prohibit and punish the publication and distribution of any book to any member of the public because of the effect such book might tend to have merely on minors, thereby unduly limiting and restricting the appellant's constitutional rights of freedom of press, there being neither charge nor proof that the book in question was sold to or possessed by a minor;

(b) it is so vague and indefinite as not to comport with due process because its provisions prohibit and punish the publication and distribution of a book if such book contains matter which tends to incite minors to wrongful conduct and corrupt their morals—a wholly vague criminal proscription, predicated upon unascertainable and indefinite standards of conduct;

(c) its provisions prohibit and punish the publication and distribution of a book merely *containing* certain proscribed language and descriptions, thus precluding any consideration of the entire book as a whole and thereby imposing and enforcing unconstitutionally restrictive limitations on the appellant's freedom of press?

Statement

The Federal constitutional questions here sought to be reviewed were initially raised by a motion to dismiss submitted to the trial court at the outset of the trial, a copy of which is attached hereto as Appendix B. The same contentions were incorporated in appellant's unsuccessful application for leave to appeal to the Supreme Court of the State of Michigan. Thus, this appeal involves a state court decision which sustained the validity of a state statute against the appellant's objections based on Federal constitutional grounds.

The prosecution itself centered about the sale by the appellant, Butler, of a book, "The Devil Rides Outside",

written by John H. Griffin and published by Pocket Books, Inc., of 630 Fifth Avenue, New York City. This was a paper bound edition of a book which had been purchased in its original hard cover publication by the Detroit Public Library and was on the shelves of such institution at the time of the trial. The appellant conceded that he had sold the book in question but claimed that the state statute infringed his constitutional rights. He contended that the book, viewed as a whole, was not obscene, lewd, immoral or lascivious, but was a serious work of artistic merit and literary value. At the trial, the appellant called two eminent literary experts, Professor Sculley Bradley of the University of Pennsylvania and Professor Frank L. Huntley of the University of Michigan, who testified in support of the appellant's contentions. In rebuttal, the People called representatives of various religious groups and also Professor Charles C. Hollis of the University of Detroit. All of the People's rebuttal witnesses virtually conceded that the book had literary value but in appraising the prosecutor's specially selected excerpts from the work, containing realistic descriptions, and some intimate sex details, claimed that such items diminished the book's literary value.

Thus, the trial accentuated the importance of one of the appellant's constitutional objections. Over objection and exception by the appellant, the People's literary expert witnesses were, under the wording of the statute, allowed or directed to pass judgment on isolated excerpts of the book, taken from their context and treated without regard to the work as a whole or its dominant themes. The trial court's justification for this testimony was the fact that the statute prohibited the sale or distribution of a book *"containing"* obscene, immoral, lewd or lascivious language or descriptions.

Moreover, the trial also highlighted another constitutional objection of the appellant in that it elicited testimony, again over the objection and exception of the appellant, that such excerpts might tend to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. Here again, the Court was acting under the wording of the statute. This procedure inevitably placed the appellant on trial on a criminal charge that was patently vague and indefinite since there were no standards of conduct, either in the statute or placed in evidence by the People, which could adequately define what incited minors to violent or depraved or immoral acts or manifestly tended to the corruption of their morals.

In his oral opinion, the trial judge flatly rejected all the constitutional objections raised by the appellant and found squarely that the statute was not in violation of the First and Fourteenth Amendments of the Constitution of the United States, and that "the language contained in the book is obscene, immoral and lewd and lascivious and is such that it tends to incite minors to violent or depraved acts, to the corruption of the morals of youth". Although the Court conceded "the sincerity of purpose of the author in writing the book" and the author's "beautiful command of the English language", it pointed out that this story of human conflicts could have been portrayed to the reader "without setting forth in detail the intimate acts and lustful effects in obscene, immoral, lewd and lascivious language, contrary to our statute." At the conclusion of his opinion, the trial judge stated that those *portions* of the book were not ***necessary*** to the work even treating the book as a whole, thus giving merely his judgment as to the literary necessity of some material incorporated in the work without making any specific finding that the book as a whole was obscene.

The Questions Are Substantial

The issues involved in this appeal, though emanating from the doctrines enunciated in *Winters* v. *New York,* (1947) 333 U. S. 507, 510, have never been squarely presented to or resolved by this Court. They involve crucial aspects of freedom of press and due process as these rights are presented by the First and Fourteenth Amendments to the Constitution of the United States.

There are now quite a number of state statutes similar to the one at bar, punishing and prohibiting publication and distribution of literature "containing" material that is obscene in that it corrupts the morals of youth or tends to incite youths to depraved and immoral acts.* Hence, the constitutional validity of this type of legislation is a most vital problem in the publishing world of today and a serious challenge to the aforesaid constitutional liberties.

Naturally, the appellant concedes that the police power of a state is broad enough to justify legislation prohibiting and punishing the publication and circulation of literature which is obscene, or one of its equivalents, lewd, indecent or lascivious. That point is not involved in the case at bar. However, the *Winters* case expressly suggested that there are limits to the extent to which this Court will permit obscenity statutes to interfere with constitutional freedom of expression, when it said:

> "Although we are dealing with an aspect of a free press in its relation to public morals, the prin-

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*For example: Colorado: Stat. Ann. (1935) ch. 48, sec. 217; Florida: Statutes (1951) sec. 847.01; Iowa: Code (1950) sec. 725.4; Maine: Rev. Stat. (1944) ch. 121, sec. 24; Rhode Island: Gen, Laws (1938) ch. 610, sec. 13; South Carolina: Code (1952) sec. 16-414; Tennessee: Williams Code (1934) sec. 11190; Vermont: Stat. Rev. of 1947, sec. 8490; Virginia: Code (1950) sec. 18-113; West Virginia: Code (1949) sec. 6066.

> ciples of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution * * *.
>
> Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (Winters v. New York (1947) 333 U. S. 507, 510).

It is by now well settled that by virtue of the Fourteenth Amendment, freedom of speech and of the press is secured to all persons against abridgement by a State.

> *Grosjean* v. *American Press Co. Inc.* (1936), 297 U. S. 233, 243;
>
> *Lovell* v. *Griffin* (1937), 303 U. S. 444, 450;
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> *Schneider* v. *State of New Jersey, Town of Irvington* (1939), 308 U. S. 147, 160;
>
> *Bridges* v. *State of California* (1941), 314 U. S. 252;
>
> *Pennekamp* v. *Florida* (1946), 328 U. S. 331, 335.

It is, of course, clear that freedom of the press is not limited to newspapers and periodicals but, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion (*Lovell* v. *Griffin* (1937), 303 U. S. 444, 450). Such liberty is protected at every step in the process of creation, publication and circulation, from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As Mr. Justice Hughes said in the *Lovell* case, *supra,* quoting from *Ex parte Jackson* (1877), 96 U. S. 727, 733:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without

> the circulation, the publication would be of little value." (Lovell v. Griffin, at p. 452)

The Michigan statute here in question is a criminal statute and as such must be strictly construed. Moreover, its constitutional validity has never been passed upon or even remotely considered by any appellate court in Michigan. Thus, when leave to appeal to the Supreme Court of Michigan was denied in this case, despite the prosecutor's concession that a "clarification of the language of" this statute was "necessary", this statute's questionable constitutional validity escaped any judicial scrutiny except that of the Recorder's court in the City of Detroit.

This statute, as we have specified above, has substantial constitutional defects which deprive any person, charged or convicted under its terms, of his constitutional rights of freedom of press and of due process of law. Moreover, the combined and cumulative impact of these defects multiplies the infringement. Thus, by its very terms, the statute incorporates a definition of obscenity which operates to punish and prohibit the circulation of a book to anyone because of the effect it might tend to have on minors. Then, if a work merely *contains* language or descriptions which are obscene only in that they tend to "incite minors to violent or depraved acts, manifestly tending to the corruption of the morals of youth", it cannot be published or distributed to any adult person in the community.

The case at bar particularly highlights this patent invasion of the appellant's constitutional right of freedom of the press because it did not deal with any actual or specifically intended distribution of the book to any minor. It was a police inspector who bought the book and brought the charge, though the work was distributed generally by newsstand sales to the public at large. There was no proof at the trial indicating the probable audience of this book.

On the other hand, there was evidence supplied by the appellant that the book was nationally advertised and distributed to the general public and without any specially stimulating promotion.

Thus, this statute and the judgment which was obtained in accordance with its terms, in effect operates as a restricted license to publish and distribute only those works which might have no ill effects upon the young. As such, we submit, it is a clear violation of the Constitutional right of free press. As Judge Learned Hand pointed out in 1913 in *United States* v. *Kennerley,* 209 F. 119, 121 (S. D., N. Y.), this type of test of obscenity would "reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few" and "forbid all which might corrupt the most corruptible."

Moreover, the statute does not simply prohibit the distribution of a book "containing" obscene, immoral, lewd and lascivious language. Throughout the statute the concept of obscenity is unqualifiedly hinged on the phrase that such obscenity must be of the type which tends to incite minors to "violent or depraved acts" and to the "corruption of the morals of youth." The judgment of the court squarely found that sections of the book in question did just that. But the appellant contends that the statutory phrase "obscene—tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth" is not based on any standard of conduct that a person can perceive or to which he can conform.

We submit, therefore, that such legislation is not sufficiently definite to enable the average member of the public to ascertain what publications are interdicted. A criminal statute can not, we submit, require that every person distributing a book correctly determine whether the work

tends to incite youths or corrupt the morals of minors, and hence the legislation herein involved is too vague and indefinite to be constitutionally valid. *Winters* v. *New York* (1947), 333 U. S. 507; *Joseph Burstyn* v. *Wilson* (1952), 343 U. S. 495; *Commercial Pictures Corp.* v. *Regents* (1954), 346 U. S. 587; *Gelling* v. *Texas* (1952), 343 U. S. 960.

The *Commercial Pictures Corp.* case, *supra,* makes manifest that this Court, construing the constitutional guarantees of freedom of press and due process, has squarely ruled that the word "immoral" and the phrase "tend to corrupt the morals" in a prohibitory statute or as the basis of an adjudication, are too vague and indefinite to comport with due process of law and operate as an unconstitutional infringement of the freedom of press. The same must be said of the statute and judgment in the case at bar because we are in no wise informed as to what standards guided the trial court in determining that "The Devil Rides Outside" tended to incite minors to the unlawful conduct specified, or to corrupt their morals. The statute itself sets up no criteria on this subject.

Finally, another defect apparent on the face of the statute is that it does not permit a consideration of the work as a whole because it prohibits and punishes the publication and circulation of a book "containing" obscene language and descriptions. It would be impossible, we submit, for a member of the public to adequately determine whether any work, especially an apparently serious and lengthy book, contains some isolated proscribed material to be judged out of its context, ripped from the total structure of the work and without consideration of its relationship to the theme, its literary style or purposes. This indefiniteness also runs afoul of due process of law.

In the case at bar, however, there is a greater requirement for definiteness because this "containing" statute also impinges on the guaranteed constitutional freedom of press. In effect, it obviates a fair consideration of the work as a whole, or the dominant purposes of the publication. At present, most federal and state courts in which the question has been considered, have explicitly adopted the requirement that book must be judged as a whole, not by its parts taken out of context. *United States* v. *One Book Entitled "Ulysses"*, 72 F. 2d. 705 (2d. Cir. 1934); *United States* v. *Levine*, 83 F. 2d. 156 (2d. Cir. 1936); *Parmalee* v. *United States*, 113 F. 2d. 729 (D. C. Cir. 1940); *Walker* v. *Popenoe*, 148 F. 2d. 511 (D. C. Cir. 1945); *Halsey* v. *N. Y. Society*, 234 N. Y. 1, 4 (1922); *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), *aff'd. sub. nom. Commonwealth* v. *Feigenbaum*, 166 Pa. Super, 120, 70 A. 2d. 389 (1950); *State* v. *Lerner*, 81 N. E. 2d. 282; (Ohio C. P. 1948); *New American Library of World Literature* v. *Allen*, 114 F. Supp. 823 (N. D. Ohio, E. D. 1953).

In recent cases in both the state and federal courts in Ohio, statutes punishing or prohibiting the circulation of a work "containing" an obscenity, or of "any" obscene nature, were held unconstitutional because in obviating a consideration of the work as a whole, such statutes were too broad an invasion of the freedom of press. *State* v. *Lerner* (1948), 81 N. E. 2d. 282, 285, *supra; New American Library* v. *Allen* (1953), 114 Fed. Supp. 823, 830-831, *supra.*

From this plethora of authority, it is manifest that prosecutions against works of literature are constitutionally valid only when the dominant effect of the work has been judged and the book considered as an integrated whole. Hence, statutes such as the one in the instant case,

that authorize a finding of obscenity based only on a part of the work are to that extent unconstitutional, as are judgments of obscenity similarly based.

Respectfully submitted,

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APPENDIX A

Opinion of Judge John A. Ricca
Recorder's Court, Detroit, Michigan

"In this case, the Detroit Police Department, through its officer, Inspector Herbert Case, arrested the defendant, Alfred E. Butler, for selling a book, namely, 'The Devil Rides Outside,' written by John H. Griffin, claimed to be in violation of Section 750.343 of the Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953, claiming it to be a book containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. The defendant claims the action should be dismissed because the provisions of the Act under which this case is brought is repugnant to the First and Fourteenth Amendments of the Constitution of the United States, and to the Constitutional provision of the Constitution of the State of Michigan, guaranteeing the right of Free Press.

Now, without reading the various Sections, various Amendments and Sections of the Constitution, I will say that in this connection, the defendant claims that the Statute is vague and indefinite and void because it merits the finding that the book contains obscene, immoral, lewd or lascivious language, without taking into consideration the literary value of the entire book, contending that it was necessary for the author to include in his book the language and descriptions objected to in order to make the book a complete work of art, and that said language was necessary to show the conflict in the feelings, thought and action of the central figure of the book who remains unnamed, and who is torn between the desires for sexual and sensual pleasures, and the longing for a spiritual life and control over his desires. The defense contends that the language objected to is necessary, because only by the detailed description of his sexual and sensual desires and

pleasures could the author show the contrast and the intense conflict raging in the man's soul, and that to change the language or descriptions would ruin or completely impair or greatly impair, rather, the work as a book, the book as a work of art.

The sincere purpose of the author being to vividly portray this intense conflict and the final victory of good over evil.

Now, after reading the book, and after having examined the authorities cited in the briefs of counsel, and after listening to the testimony offered in this case, the Court finds that the Act under which this case is brought is not unconstitutional, as being in violation and repugnant to the First and Fourteenth Amendments of the United States Constitution or against the Section of the Michigan Constitution guaranteeing the right of the Freedom of the Press.

And the Court further finds that the State of Michigan under its police power may secure the health and welfare of its citizens and its youth, and that it had a right to pass the Act in question.

The Court further finds that the language contained in the book is obscene and immoral and lewd and lascivious, and is such that it tends to incite minors to violent or depraved acts, to the corruption of the morals of youth. There is little question as to the sincerity of purpose of the author in writing the book, but such sincerity does not afford him the privilege or license of violating the law and seek to justify it under the guise of being absolutely necessary in order to maintain the literary value of the book.

There is little question in the mind of the Court that the author, with his beautiful command of the English language, could have portrayed to the reader the conflict within this individual, without setting forth in detail the intimate acts and lustful feelings in obscene, immoral, lewd and lascivious language, contrary to our Statute.

Now, in that connection, I've listened to the experts called by both sides and I am not convinced that that part

of the book dealing with the sexual acts and pleasures of the author was necessary, even treating the book as a whole. However, the Court does have to find that it is in violation of this particular Statute because the Statute does say that it is sufficient to contain lewd, immoral, obscene and lascivious language or description.

So that if, therefore, if there ever is a review of my decision in this matter, I am not trying in any way to evade the issue; I am trying to follow the Statute as it is. So, I am holding that the defendant is guilty because he sold a book in the City of Detroit containing this language, and also because the Court feels that even viewing the book as a whole, it was not necessary to the proper development of the theme of the book nor of the conflict expressed therein.

Therefore, the Court finds the defendant guilty of the charge and orders him to pay a fine in the amount of $100."

APPENDIX B

STATE OF MICHIGAN

IN THE

RECORDER'S COURT OF THE CITY OF DETROIT

STATE OF MICHIGAN, *Plaintiff,* —*vs*— ALFRED E. BUTLER, *Defendant.*	No. .....

MOTION TO DISMISS

TO THE HONORABLE JOHN A. RICCA, ONE OF THE JUDGES OF THE RECORDER'S COURT OF THE CITY OF DETROIT:

Now comes the above named defendant by his attorneys, MANUEL LEE ROBBINS and WILLIAM G. COMB, and moves the Court to dismiss the warrant heretofore issued in this cause under Section 750.343 P. A. 1953, Title 25, M. S. A. Sec. 28.575, for the following reasons:

1. Because the provisions of Section 740.343 P. A. 1953, Title 25, M. S. A. Sec. 28.575, referred to and incorporated in the charges against the above named defendant are repugnant to the Fourteenth Amendment to the Constitution of the United States of America.

Argument

The said amendment, in pertinent part, states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute provides,

"Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd, or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor."

This motion is addressed to the fact that the said statute, in including in its prohibitions, a distribution of a book or other work "containing" the proscribed type of alleged obscenity is, on its face, therefore, so vague and indefinite in form as to permit within the scope of its language the punishment of incidents fairly within the guaranteed right of free press, protected against said interference by the said Amendment.

The defendant also moves the Court to dismiss the said warrant on the ground that the said statute by inclusion of the word "containing", permits on its face, a finding or judgment of obscenity on only part of the book and without

consideration of the entire book and the relationship of the disputed passages to its theme, and is therefore, to that extent, a violation of defendant's freedom of press guaranteed to him by the said Amendment.

Finally, the defendant also moves the Court to dismiss the warrant on the ground that the said statute on which the charge is predicated, on its face incorporates a definition of obscenity which blanketly prohibits and punishes the circulation of a book to anyone because of the effect it might tend to have on minors and therefore deprives the defendant of his constitutional right of freedom of press protected from state interference by the said Amendment.

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